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NOT FOR PUBLICATION

AUG 01 2005

HAROLD S. MARENUS, CLERK U.S. BKCY. APP. PANEL OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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6	In re:)	BAP	No.	CC-	-04-1434-MaTh
7	MERAN HAMILTON,)	Bk.	No.	LA	04-24924-AA
8		Debtor.)				
9)				
10	MERAN HAMILTON,)				
11		Appellant,)				
12	V.)	MEMO	ORAN	DUM ¹	L
13	CHO CHO HERNANDEZ,)				
14		Appellee.)				

Argued and Submitted on May 12, 2005 at Pasadena, California

Filed - August 1, 2005

Appeal from the United States Bankruptcy Court for the Central District of California

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding.

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Before: MARLAR, TCHAIKOVSKY2 and KLEIN, Bankruptcy Judges.

preclusion. See 9th Cir. BAP Rule 8013-1.

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may not be cited to or by the courts of this circuit except when

relevant under rules of res judicata, including issue and claim

This disposition is not appropriate for publication and

Hon. Leslie J. Tchaikovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

INTRODUCTION

In this appeal, a chapter 13^3 debtor seeks to reverse the

bankruptcy court's order granting relief from the automatic stay on the debtor's residence. The court granted the motion because the property had been sold at a pre-petition foreclosure sale, and therefore debtor was not the owner when the case was filed.

Because debtor was no longer the owner of the property, debtor had no equity in the residence and it was not necessary to an effective reorganization. As the bankruptcy court did not abuse its discretion, we AFFIRM.

FACTS

Meran Hamilton ("Hamilton") was the record title owner of real property located at 7514 West 90th Street, Los Angeles, California ("Property"). The first and second deeds of trust on the Property were held by Chase Manhattan Mortgage Company ("Chase"), and the third deed of trust was held by Beneficial.

Prior to the petition date, both of the Chase deeds of trust were in non-judicial foreclosure proceedings, with a combined trustee's sale date set for July 6, 2004. Hamilton retained Allstate Home Loans ("Allstate") to negotiate a postponement of the Chase foreclosures so that Hamilton could obtain refinancing and cure the Chase defaults. On June 25, 2004, Chase faxed a letter to Allstate's representative stating that the Chase representative had "instructed [the] foreclosure dept. to postpone

Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

the foreclosure sale until 7/9/04 on the above loan."

Importantly, the fax referenced only loan number 15944648, which was one of the two notes held by Chase.

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However, the foreclosure sale on Chase's second deed of trust went forward, and took place on July 6, 2004. The Property was sold to Cho Cho Hernandez ("Hernandez") for \$120,157.86, subject to the senior Chase deed of trust in the amount of \$435,093.93. The Trustee's Deed Upon Sale was recorded with the Los Angeles County Recorder's Office on July 16, 2004.

Hamilton filed his Chapter 13 petition on July 8, 2004. On August 4, 2004, Hernandez filed a Motion for Relief from the Automatic Stay, in order to forcibly evict Hamilton and his family, on two grounds: (1) under § 362(d)(1) for cause because Hernandez acquired the Property at a pre-petition foreclosure sale and thereafter timely recorded the Trustee's Deed Upon Sale; and (2) under §§ 362(d)(2)(A) and (B) because Hamilton had no equity in the Property and because the Property was not necessary to an effective reorganization.

On the date scheduled for the hearing on the Motion for Relief, Hamilton responded, asserting the Property was necessary for an effective reorganization and that the title was in dispute. On the same date, Hamilton filed an adversary proceeding against Chase, Hernandez, Lonestar Mortgagee Services and Allstate to avoid the pre-petition transfer of the Property. The record reflects that at the hearing on the Motion for Relief, the bankruptcy judge was made aware of the recently filed adversary proceeding.

Also on the same date, Hernandez's Motion for Relief was

heard by the bankruptcy court. The Court granted the Motion for Relief pursuant to \$\$ 362(d)(1) and (2).

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ISSUES

- Whether cause existed under § 362(d)(1) for the Court to grant relief from the stay to allow appellee to proceed with an unlawful detainer action against Hamilton, even though Hamilton had a pending adversary proceeding to avoid the transfer to Hernandez?
- Whether cause existed under § 362(d)(2) for the Court to grant relief from the stay to allow appellee to proceed with an unlawful detainer action against Hamilton, even though Hamilton had a pending adversary proceeding to avoid the transfer to Hernandez?

STANDARD OF REVIEW

The panel reviews the bankruptcy court's order granting a motion for relief from the automatic stay for abuse of discretion. In re Berg, 192 B.R. 557, 560 (9th Cir. BAP 1996). Under the abuse of discretion standard, the panel will not reverse unless it is "definitely and firmly convinced that the bankruptcy court committed a clear error of judgment." Warrick v. Birdsell (In re Warrick), 278 B.R. 182, 184 (9th Cir. BAP 2002).

DISCUSSION

Hamilton argues that the unique circumstances of the case compelled a denial of the Motion for Relief from the Automatic Stay. Hamilton asserts that (1) Hernandez's title to the Property was flawed because it was obtained as the result of the misleading acts and misrepresentations of Chase and that Hamilton had filed an adversary proceeding seeking to quiet title prior to the hearing on the Motion for Relief from Stay; (2) the Property was necessary for an effective reorganization; and (3) there was equity in the Property.

Hernandez maintains that the title to the Property had passed to her at the time of the bankruptcy filing, and therefore the bankruptcy court had cause to grant the Motion. Hernandez also asserts that Hamilton did not provide a plausible rationale for his preferential and fraudulent transfer theories. Finally, Hernandez argues that there was cause to grant the Motion for Relief because the Property was not necessary for an effective reorganization and Hamilton did not have any equity in the Property, since Hamilton had been divested of title when the foreclosure sale occurred and Hernandez's money had been paid to the foreclosing creditor.

A. <u>Section 362(d)(1)</u>

Section 362(d)(1) provides that a bankruptcy court can grant relief from the stay "for cause, including lack of adequate protection of an interest in property of such party in interest."

"Cause" has no clear definition and is determined on a case-by-case basis. <u>In re MacDonald</u>, 755 F.2d 715, 717 (9th Cir. 1985).

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California Civil Code § 2924h(c) provides, in pertinent part: "[T]he trustee's sale shall be deemed final upon the acceptance of the last and highest bid, and shall be deemed perfected as of 8 a.m. on the actual date of sale if the trustee's deed is recorded within 15 calendar days after the sale. . . . " The foreclosure sale took place on July 6, 2004, at which point Hernandez presumptively gained legal and equitable title to the Property. Hernandez filed the Trustee's Deed Upon Sale on July 16, 2004, within the 15 day relation-back period allowed by the statute. Therefore, because the timely recordation retroactively vests title as of 8:00 a.m. on the date of the sale, Hernandez held both legal and equitable title to the Property as of 8 a.m. on July 6, 2004, two days before Hamilton filed for bankruptcy. <u>In re Bebensee-Wonq</u>, 248 B.R. 820, 823 (9th Cir. BAP 2000) (pursuant to § 2924h(c), the trustee's sale becomes perfected at 8 a.m. on the day of the sale. When the trustee's sale is held before the debtor files bankruptcy, perfection is deemed to have occurred before the filing, even if the buyer of the property records post-petition.). See also In re Engles, 193 B.R. 23 (S.D. Cal. 1996) ("This fifteen day window effectively provides purchasers with a quarantee that even if a deed is not recorded until day fifteen, they will still hold title superior to those who record first, including debtors or their trustees in bankruptcy").

Since Hernandez presumptively held title to the Property as of July 6, 2004, Hamilton's interest in the Property was

eliminated pre-petition. The Property did not become property of his estate under § 541 because Hamilton had no interest in the Property as of the date of filing his bankruptcy petition. Butner v. United States, 440 U.S. 48 (1979) (property rights are determined by reference to state law). Since the Property was not property of Hamilton's bankruptcy estate, it was not subject to the automatic stay. Therefore, the bankruptcy court had "cause" for lifting the automatic stay under § 362(d)(1), in order to enable Hernandez to proceed with eviction.

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However, the limitations of the lift stay procedure must be made clear. Relief from stay merely authorizes the putative owner to pursue an unlawful detainer proceeding in a nonbankruptcy court of competent jurisdiction. Since the bankruptcy court was correct in lifting the stay, it is now possible for Hernandez to pursue an unlawful detainer proceeding. On the other hand, Hamilton is free to contest the validity of the foreclosure sale under California law. This stay relief litigation does not affect the ability of Hamilton to rely on state law in defense of the merits of an unlawful detainer proceeding. But that collateral dispute is not necessarily pertinent to stay relief proceedings.

As to Hamilton's adversary proceeding against Chase,
Hernandez, Lonestar Mortgagee Services and Allstate, which seeks
to avoid the pre-petition transfer of the Property, it is not
permissible to use a stay relief motion to resolve such underlying
substantive questions. <u>Johnson v. Righetti (In re Johnson)</u>, 756
F.2d 740 (9th Cir. 1985) ("Stay litigation is limited to issues of
the lack of adequate protection, the debtor's equity in the
property, and the necessity of the property to an effective

reorganization. Hearings on relief from the automatic stay are thus handled in a summary fashion. The validity of the claim or contract underlying the claim is not litigated during the hearing. The action seeking relief from the stay is not the assertion of a claim which would give rise to the right or obligation to assert a counterclaim. Thus, the state law governing contractual relationships is not considered in stay litigation." [citations omitted]).

Therefore, addressing the underlying claims of Hamilton's adversary proceeding is unnecessary. All that is material here is that a foreclosure sale occurred in circumstances that presumptively passed valid title to Hernandez, which property Hamilton continued to occupy. Hamilton's possessory interest in the Property was protected by the automatic stay, and it is solely this possessory interest that was the appropriate subject for stay relief.

B. <u>Section 362(d)(2)</u>

Section 362(d)(2) provides relief from the automatic stay when the debtor has no equity in the property and the property is not necessary to an effective reorganization. Both elements of the test must be met. See, e.g., <u>In re Egea</u>, 167 B.R. 226 (Bankr. D.Kan. 1994).

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1. <u>Debtor has No Equity in the Property</u>

The party requesting relief from the stay has the burden of

proof on the issue of the debtor's equity in the property.

Section 362(g). Hamilton asserts that Hernandez did not meet her burden in proving that Hamilton did not have equity in the Property. Hernandez claims that equity is defined as "the value, above all secured claims against the property, that can be realized from the sale of the property for the benefit of the unsecured creditors." Stephens Industries, Inc. v. McClung, 798

F.2d 386, 392 (6th Cir. 1986); In re Mellor, 734 F.2d 1396, 1400

n.2 (9th Cir. 1984). Hernandez contends that after deducting Hamilton's secured claims and the homestead exemption, there would be nothing left for any unsecured creditors. The Ninth Circuit has held that equity is "the amount or value of a property above the total liens or charges." Stewart v. Gurley, 745 F.2d 1194, 1196 (9th Cir. 1984) (citations omitted).

But both parties are missing the point. Here, Hamilton did not have equity in the Property at the time of filing his bankruptcy petition because, as stated above, he no longer held the title to the Property as of the date of filing. The Property was purchased by Hernandez prior to Hamilton's bankruptcy filing. Thus any equity that Hamilton had in the Property before the foreclosure sale was lost when Hernandez purchased it. Therefore, Hamilton did not have any equity in the Property for purposes of stay relief analysis.

2. The Property is Not Necessary for an Effective Reorganization

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Hamilton asserts that the Property is necessary for an effective reorganization because he lives in the Property with his

wife and two minor sons. Again, because Hamilton did not own the Property as of the date of filing his bankruptcy petition, the property cannot be necessary for Hamilton's effective reorganization.

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27 Our decision is limited to the question whether the appellee should be allowed to pursue an unlawful detainer action 28 in a court of competent jurisdiction and expresses no view about the merits of such litigation, the ultimate viability of the appellee's title, or the validity of the adversary proceeding filed by the debtor.

CONCLUSION

The bankruptcy court did not abuse its discretion in lifting

the automatic stay under §§ 362(d)(1) and (2). There was cause for lifting the stay because Hernandez recorded the Trust Deed within the fifteen days allowed by § 2924h, thereby legally divesting Hamilton of title before Hamilton filed bankruptcy. Hamilton had no interest in the Property as of the date of the filing of his petition. For the same reasons, the bankruptcy court did not abuse its discretion in lifting the stay under § 362(d)(2) because Hamilton lacked equity in the Property and the

Property was not necessary to an effective reorganization since

Hamilton did not have a sufficient interest in the Property as of

the petition date. Without ownership, the Property could not

support an effective reorganization. Therefore, we AFFIRM the

bankruptcy court's decision granting relief from the automatic

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